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Supreme Court of the United States

October Term, 1965

No. ~~1999~~ 118

JAMES A. DOMBROWSKI and
SOUTHERN CONFERENCE EDUCATIONAL
FUND, Inc.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Supreme Court of the United States

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against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioners, James A. Dombrowski and Southern Conference Educational Fund, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the orders of the United States District Court for the District of Columbia, dismissing the cause of action for injunctive relief and granting summary judgment against petitioners in the cause of action for money damages.

Opinions Below

The Court of Appeals affirmed the orders of the District Court in a *per curiam* opinion in which only two Circuit Judges joined. (Circuit Judges Burger and McGowan

joined in the opinion. Senior Circuit Judge Washington did not participate in the decision.) The *per curiam* opinion is not yet reported and is reprinted herein in Appendix A.

The District Court opinion by District Judge Holtzoff, dismissing so much of the complaint as sought injunctive relief, is not yet reported and is reprinted herein as Appendix B. No opinion was filed by District Judge Sirica in granting respondents' motion for summary judgment in the cause of action for money damages.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the concept of legislative immunity embodied in Article I, Section Six of the Constitution totally immunizes a United States Senator and a Senate employee from a law suit for money damages under the Civil Rights Act, where the complaint charges that the Senator and the employee participated in a conspiracy together with officials of the State of Louisiana, under color of unconstitutional state laws, to contrive illegal and false arrests of citizens and illegal raids and seizures of books, records and membership lists of civil rights organizations in violation of the Fourth Amendment, all for the purpose of deterring and frightening these citizens and many others from exercising fundamental rights under the First Amendment in their efforts to enforce the constitutional guarantee of Negro freedom and equality in the Southern states?

2. Whether summary judgment for the defendants should have been granted by the district court in an action

for money damages under the Civil Rights Act where the Court of Appeals concedes that absent considerations of legislative immunity the record reveals material disputed issues of fact relating to the participation of a Senator and a Senate employee in a knowing concert of action with state officials to utilize unconstitutional state laws to contrive illegal arrests and raids and seizures in violation of the Constitution and laws of the United States?

3. Whether the doctrine of legislative immunity embodied in Article I, Section Six of the Constitution protects an employee of the legislature from a law suit for money damages under the Civil Rights Act where the complaint charges and the record shows material disputed issues of fact relating to the employee's participation in a conspiracy together with state officials to utilize unconstitutional state laws to contrive the illegal arrest of citizens and illegal raids and seizures in violation of the Fourth Amendment, for the purpose of deterring and frightening these and other citizens from exercising fundamental constitutional rights in their efforts to enforce the guarantees of racial equality in the Southern states?

4. Whether, if the doctrine of legislative immunity embodied in Article I, Section Six is not available to this employee, the judicially developed doctrine of immunity of government officers developed by this Court in *Barr* v. *Matteo* is applicable to this employee and, if so, should the doctrine of that case be reconsidered by this Court?

5. Whether a complaint states a cause of action for equitable relief under the Civil Rights Acts where an injunction is sought restraining participants in a conspiracy with state officials to utilize state laws to contrive illegal arrests, searches and seizures in violation of the Constitution from using or disposing of the illegally obtained fruits of the unconstitutional raids and seizures?

6. Whether the reinstatement of the cause of action for equitable relief is required to implement and further the purposes of the mandate and decision of this Court in *Dombrowski* v. *Pfister*, 380 US 479?

Statement of the Case

The serious and substantial questions raised in this petition arise out of the factual context of the illegal arrests and raids under the color of unconstitutional Louisiana state statutes, already considered by this Court in *Dombrowski* v. *Pfister*, 380 US 479 (1965).

A—Statement of Facts

1. The Facts Preceding the Institution of the Present Action for Injunctive Relief and Money Damages

Petitioner Southern Conference Educational Fund, Inc., hereafter referred to as "SCEF", is a non-profit membership corporation organized under the laws of the State of Tennessee and maintains an office in the State of Louisiana (1a).[1] The purpose and function of SCEF as an association is to attempt to secure to Negro citizens the rights guaranteed to them under the federal Constitution and to participate in efforts to end all forms of segregation in the Southern states (1a). See *Dombrowski* v. *Pfister*, at p. 482. Petitioner, Dr. James A. Dombrowski, was then the Executive Director of SCEF and was a citizen of the State of Louisiana and the United States (1a, 20a). Both SCEF and Dr. Dombrowski were successful appellants in *Dombrowski* v. *Pfister, supra.*

Respondent Eastland is the senior Senator from the State of Mississippi and respondent Sourwine is the Chief

[1] All references are to the printed joint appendix in the Court of Appeals.

counsel of the Internal Security Subcommittee of the Senate.

Sometime in the summer of 1963, private discussions were held between respondent Sourwine and one Jack N. Rogers, counsel to the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature concerning the records, lists and files of SCEF (50a, 51a).

On the afternoon of October 4, 1963, certain police officers of the Police Department of the City of New Orleans, Louisiana, together with officers of the Louisiana State Police and representatives of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, broke into and forcibly entered the office of SCEF in the City of New Orleans and proceeded to seize the entire contents of the office including the books and records of the organization, its ledgers, receipts, memoranda, membership lists, lists of contributors, vouchers, pamphlets and literature, together with many items of personal property belonging to Dr. Dombrowski. The office was totally ransacked and everything movable taken out (3a, 20a through 25a). Dr. Dombrowski was placed under arrest and booked for violation of Louisiana Revised Statutes 14:358 et seq. and 14:390 et seq., known as the Louisiana Anti-Subversive Laws (19a).[2] The same day officers of the New Orleans Police Department of the State Police, together with representatives of the Louisiana Joint Legislative Committee, proceeded to search the residence of Dr. Dombrowski in the City of New Orleans and seized many items of personal property from his house and from his automobile located nearby (21a). The circumstances of the arrests and raids were detailed by this Court in the

[2] The provisions of the Louisiana law under which Dr. Dombrowski was arrested were later stricken as facially unconstitutional by this Court in *Dombrowski* v. *Pfister, supra.*

Dombrowski opinion. See footnote four, 380 US at 479, 480.[3]

The raids of October 4 and the arrest of Dr. Dombrowski were conducted purportedly under the authority of search warrants and arrest warrants issued on October 2nd by a Judge of the Criminal District Court of the Parish of Orleans. However, at a preliminary hearing, a Judge of the Criminal District Court for the Parish of Orleans, after taking evidence, summarily discharged the defendants. The state judge held that the arrest warrants were improvidently issued and that there was no reasonable cause for the arrests (19a). See dissenting opinion of Circuit Judge Wisdom in *Dombrowski* v. *Pfister*, 227 F. Supp., at 573. Moreover at a later stage in the state proceedings the state court granted a motion to suppress the seized evidence on the ground that the raids were illegal in violation of the Federal Constitution relying upon this

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[3] The text of the Court's footnote is as follows:

"The circumstances of the arrests are set forth in Judge Wisdom's dissenting opinion:

'At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's *Journal*. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrest resulted from "racial agitation."' 227 F. Supp., at 573."

Court's decision in *Mapp* v. *Ohio*, 367 US 643.[4] (The opinion of the state court granting the motion to suppress is set forth in Appendix C.) Consequently, under rulings of the Louisiana state courts both the arrests and raids were wholly illegal. As this Court pointed out in *Dombrowski*, "Later in October a state judge quashed the arrest warrants as not based on probable cause, and discharged the appellants. Subsequently, the court granted a motion to suppress the seized evidence on the ground that the raid was illegal." 380 US at p. 488.

The illegality of the raids was further underscored by the decision of this Court in *Dombrowski* directing that on remand the decree of the three-judge court shall include an order directing the "immediate return of all papers and documents seized." 380 US at p. 497.

However, despite the ruling of the state court in October that the arrest warrants were illegal and issued without probable cause, the books, records, documents, memberships lists and other articles which had been seized during the raids were not returned to the petitioners but were, secretly and without petitioners' knowledge, transferred to the possession of the respondents Sourwine and Eastland. Apparently, sometime prior to the raids discussions had been held between Rogers, the counsel to the Louisiana Joint Committee, and respondent Sourwine, during which the question of the records and files of SCEF was discussed. The uncontested record facts next show that sometime in the evening of the raids, October 4th, Rogers telephoned Sourwine informing him that the Louisiana Committee had obtained all the records, files, membership lists and other materials belonging to SCEF (53a). Respondent

[4] The motion to suppress was made after indictments were returned following the dissolution of Judge Wisdom's temporary restraining order by the majority of the three-judge court. See 380 US at 484. The state court opinion was rendered subsequent to oral argument before the Court of Appeals in the present case.

Sourwine then appeared in Baton Rouge, Louisiana, the next morning (54a). He had in his possession blank subpoenas signed by respondent Eastland.[5] These subpoenas, according to respondent Sourwine's testimony, were served on Rogers that morning, although the subpoenas on their face were dated October 4th, the day of the raids (35a, 36a). Respondent Sourwine maintained this was a "stenographic error" (35a, 36a). The Superintendent of the Louisiana Police was "appointed" on the same day "custodian" of these records and documents by respondent Sourwine (37a). However, the physical location of the records and other material remained in Baton Rouge physically under the control of the state officials (37a). Respondent Sourwine later testified that the issuance of the blank subpoenas dated October 4th, was never authorized by the Internal Security Subcommittee of the Senate, and that these subpoenas were not specifically authorized by the Committee or the Subcommittee (35a, 36a).

These relations between respondent Sourwine and the Louisiana officials on the evening of the raids and the next day were unknown to the petitioners until the day of the preliminary hearing on October 25th when the Louisiana officials informed the state court that they could not comply with any order to return the documents and membership lists seized during the illegal arrests since they were technically in the custody of the respondents Sourwine and Eastland although physically still in the possession of state officials. Until that moment respondents' participation in the events of October 4th and 5th was completely unknown to petitioners or to the press or public.

Immediately after the ruling of the state court on October 25th voiding the warrants of arrest under the disclosure of respondents' role in the seizure of the docu-

[5] The record reveals that respondent Sourwine had access to a "folder which contains a number of subpoenas signed by the Senator in blank" (36a).

ments, petitioners instituted in the United States District Court for the Eastern District of Louisiana, New Orleans Division, a federal plenary action under the Civil Rights Act and the Constitution, seeking injunctive relief and money damages. The action is referred to hereafter as the first action.[6]

Petitioners joined, as defendants in the first action, the Louisiana state officials involved in the raids together with respondent Eastland charging a conspiracy under the color of Louisiana state law to deprive the appellants of rights, privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States (7a). The complaint was filed on Sunday morning, October 27th. A motion for a temporary restraining order restraining the defendants from removing any of the seized documents, records and other articles from their location in Baton Rouge, and from delivering them, or surrendering them in any way to respondent Eastland, was immediately presented to Federal District Judge Ainsworth of the Eastern District of Louisiana (29a). Judge Ainsworth was assured by representatives of the State that the seized material was then still at the State Police Headquarters in Baton Rouge. Judge Ainsworth thereupon directed that the motion be returnable before him Monday morning, October 28th, in New Orleans and ordered petitioners to notify the defendants in the action that the restraining order would be heard in the District Court that Monday morning (29a). The appellants notified respondent Eastland by telegram (29a).[7]

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[6] This action was entitled *Dombrowski* v. *Burbank*, #13,967, in the Eastern District of Louisiana, New Orleans Division.

[7] The telegram read as follows: "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 AM, October 28th, to discuss an injunction enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland" (59a).

The uncontested record facts are that on Sunday evening, October 28th, respondent Eastland notified respondent Sourwine by telephone of the receipt of this telegram and directed respondent Sourwine to telephone Baton Rouge at once and arrange to have all of the records, documents, membership lists and other materials transferred that night out of the State of Louisiana (60a). At about midnight, Sunday night, a vanload of material containing these records and documents was moved over the Louisiana state border to Woodville, Mississippi, through arrangements made by respondent Sourwine (29a) and was deposited with the clerk of the Chancery Court in Woodville (29a). On Monday morning, October 28th, attorneys for the Louisiana state officials informed the Federal District Judge that the records and material seized in the raid, the subject of the temporary restraining order, were no longer in the jurisdiction of the Federal District Court for the Eastern District of Louisiana and that the matter was therefore moot (29a).

Immediately thereafter petitioners filed the present complaint in the United States District Court for the District of Columbia, the residence of respondents Sourwine and Eastland.

2. The Initiation of the Present Complaint

The present complaint (1a-11a) paralleled almost identically the basic allegations of the complaint filed on October 27th in the Eastern District of Louisiana in the first action. The present complaint alleged that the defendants Thomas D. Burbank, Russell R. Willie, James H. Pfister, all state officials, and respondents Eastland and Sourwine, entered into a plan, agreement and conspiracy, under the color of Louisiana state laws and statutes, to deprive the petitioners of rights, privileges and immunities granted to them as citizens of the United States under the laws and Constitution of the United States. The complaint alleged

that pursuant to this conspiracy the defendants, under the color of certain Louisiana state statutes, planned and carried through raids of the petitioners' homes and offices, as well as causing the arrest of petitioner Dombrowski, in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

The complaint further alleged that the defendants conspired, under the color of the Louisiana state statutes, to seize books, records, lists of members, contributors and friends of petitioner SCEF who were engaged in efforts throughout the states of the South to implement the Equal Protection Clause of the Fourteenth Amendment. The complaint further alleged that these activities of the defendants was for the purpose of harassing, intimidating and deterring the petitioners, their friends, members and supporters from exercising federally-protected constitutional rights. The complaint further alleged that the illegal actions of the defendants, under color of the Louisiana state statutes, has resulted in serious damage to the plaintiffs.

The complaint further alleged that one of the central purposes of the conspiracy was to obtain possession of the membership lists of the petitioner SCEF, a civil rights organization. Since the decision of this Court in *NAACP* v. *Alabama*, 357 US 449, it has become increasingly clear that the enforced production of membership lists of organizations actively seeking enforcement of the Equal Protection Clause in the Southern states itself violates the Constitution, 357 US, at p. 462; see also *NAACP* v *Flowers*, 377 US 288; *Louisiana* v. *NAACP*, 366 US 293. The complaint charged that the respondents, together with the Louisiana state officials, sought to utilize the Louisiana laws as a pretext for the obtaining of the membership lists through raids and seizures, which they could not have otherwise obtained through lawful legislative process.

The complaint sought money damages in the amount of $250,000 for each plaintiff as well as appropriate injunctive relief.

B—Proceedings Below

1. Proceedings in the District Court

After the filing, and serving of the complaint upon those defendants who were Washington, D. C., residents, respondents Eastland and Sourwine,[8] a motion for a preliminary injunction came before the District Court for the District of Columbia on December 18th, 1963. Although petitioners sought to withdraw the motion in order to take a deposition of respondents in support of the request, the District Court, by Judge Holtzoff, entered an order from the bench dismissing so much of petitioners' complaint as sought injunctive relief against the defendants (12a-14a). Judge Holtzoff delivered an oral opinion in support of his conclusions that the granting of injunctive relief would "contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this Court" (Appendix B). Notice of appeal was duly filed from this order. The order of Judge Holtzoff left undisturbed so much of the complaint as set forth a cause of action for money damages against respondents.

Pursuant to the Federal Rules of Civil Procedure a deposition of respondent Sourwine was taken by petitioners. Subsequent to this, a deposition of Walter Dillon, Esq., one of the attorneys for the petitioners, was taken by the respondents. Both of these depositions are part of the files of the case. A portion of the deposition of respondent Sourwine is printed as part of the Joint Appendix in the Court below (36a, 37a). Immediately subsequent

[8] Service was never effected in this action upon the Louisiana defendants. Similarly, service was not effected upon Eastland, as a defendant in the first action.

to the taking of these depositions, respondents moved to dismiss the complaint or, in the alternative for summary judgment (15a). Identical motions were made in the first action in the Federal District Court in Louisiana by the Louisiana state defendants. Affidavits were filed in both actions in support of the motion and in opposition.[9]

On March 12, 1964, the District of Columbia District Court, by Judge Sirica, granted the motion for summary judgment in respect to the cause of action for damages (17a). No opinion was filed. A notice of appeal was duly filed from the order granting summary judgment (17a). A subsequent order of the Court of Appeals consolidated the appeals from the first order dismissing the complaint insofar as it prayed for injunctive relief and the second order granting summary judgment on the cause of action for damages.

2. Proceedings in the Court of Appeals for the District of Columbia

The Court of Appeals in a *per curiam* opinion, in which Senior Circuit Judge Washington did not participate, affirmed the orders of the District Court. In respect to the dismissal of the request for injunctive relief the Court held that the relief sought was properly denied on the limited ground that an equitable decree against respondents Eastland and Sourwine restraining their use of the illegally

[9] Subsequent to the filing of these affidavits but prior to the hearing on respondents' motion, petitioners filed affidavits of counsel seeking to invoke Rule 56, Subdivision (f) of the Federal Rules of Civil Procedure, which would permit the Court on a motion for summary judgment to grant a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had" (30a-35a). These affidavits of counsel set forth certain questions of fact which were discovered after respondents' motion, which indicated the existence of additional serious and sharply disputed material issue of facts which would have required the denial of a motion for summary judgment.

seized material and requiring its return would not be effective since the materials were then in the possession of the Subcommittee itself.

In respect to the cause of action for money damages, the respondents had urged two positions in the Court of Appeals: (1) that petitioners failed to put forward a serious claim that respondents were parties to a knowing concert of action with the state officials, and (2) in any event the doctrine of legislative immunity insulated both respondents from suit. See opinion of court, Appendix A. The Court of Appeals, rejecting the first contention, pointed out that "were only the former involved we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial." However, the Court of Appeals based its affirmance solely upon an assumption that the doctrine of legislative immunity wholly insulates the respondents from this damage action, resting upon this Court's decisions in *Tenney* v. *Brandhove,* 341 US 367 (1951); *Barr* v. *Matteo,* 360 US 564 (1959); and *Wheeldin* v. *Wheeler,* 373 US 647 (1963).

3. Proceedings in the First Action in the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit

Simultaneous with the motion made in this action in the district court, the Louisiana state officials, defendants in the first action, made identical motions on identical grounds, before District Judge Ainsworth in the Eastern District of Louisiana. On March 18, 1964, Judge Ainsworth denied the motion of James Pfister, a member of the Louisiana legislature, and the Chairman of the Joint Legislative Committee for summary judgment in the cause of action for money damages. Pfister had urged, in identical terms as respondents here, that he was entitled to absolute legislative immunity under the doctrine of this Court in *Tenney* v. *Brandhove, supra.* Judge Ainsworth denied the

motion holding that "there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates he is alleged to have committed tortious acts against plaintiff". (This opinion is set forth in Appendix D.) Judge Ainsworth concluded that on the facts of this case, the opinion of the Court in *Tenney* did not require summary dismissal of the cause of action for money damages.[10]

In March, 1965, Chairman Pfister renewed his motions for summary judgment or for dismissal, and moved in the alternative for an order as authorized by 28 USC 1292(b) to appeal the District Court's denial of his motions to the Court of Appeals. On March 18, 1965, Judge Ainsworth, in a careful opinion, reaffirmed his refusal to grant the motions. The opinion, reproduced here as Appendix E, restates the conclusion of the District Court that the illegal acts charged against Chairman Pfister do not receive an automatic blanket immunity under this Court's decision in *Tenney*, and that the issue of whether these illegal acts are in fact within any protected orbit of legislative activity must be tried in court. However, in the interest of "judicial economy" Judge Ainsworth granted an order for an interlocutory appeal under 28 USC 1292(b) from his refusal to grant the motions for summary judgment in the money damages cause of action. The Court of Appeals for the Fifth Circuit thereafter dismissed Chairman Pfister's appeal. *Pfister* v. *Dombrowski*, Misc. #168, 1965, Court of Appeals for the Fifth Circuit (denying leave to take the interlocutory appeal). As a result, the cause of action for money damages in the first action against Chair-

[10] In a companion opinion on the same day a similar motion for summary judgment made by another state official, Major Willie, was denied by Judge Ainsworth. A motion by the Superintendent of State Police Burbank for summary judgment was granted, not on immunity grounds, but for failure to present a sufficient case of connection with the conspiracy.

man Pfister and the other Louisiana officials will be tried in the Federal District Court for the Eastern District of Louisiana and is presently on the trial calendar.[11]

Accordingly the decisions of the Fifth Circuit and the Court of Appeals for the District of Columbia are in sharp conflict as to the applicability of the doctrine of legislative immunity to civil rights damage actions arising out of the context of events previously considered by this Court in *Dombrowski* v. *Pfister*. This conflict between the Circuits arises in great measure out of a difference in interpretation of the controlling decisions of this Court.

Reasons for Granting the Writ

This petition raises serious and substantial questions arising once again out of the factual complex which was the occasion of the Court's examination in *Dombrowski* v. *Pfister*, in the October 1964 Term, 380 US 479. And once again, as in the original case, questions arising out of petitioners' efforts to seek redress in the national courts for injury to their fundamental rights touch on issues of importance not only to the enforcement of laws protecting civil rights but to the very essentials of a judicial system constructed upon the premise that this is a government of law and not men.

1. The opinion of the Court of Appeals rests upon an extension of the doctrine of legislative immunity which is at war with the applicable decisions of this Court and with the first principles of a government predicated upon the assumption that no man no matter how high his position

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[11] Chairman Pfister also attempted to implead the other members of his Legislative Committee as third-party defendants. Judge Ainsworth dismissed Chairman Pfister's third-party complaint, and this dismissal is presently on appeal to the Fifth Circuit. *Pfister defendant, 3rd Party Plaintiff* v. *Arcenequx, 3rd Party Defendant*, #22,562, Court of Appeals for the Fifth Circuit.

stands wholly above the law. Cf. *Marbury* v. *Madison*, 1 Cranch 137, 163-168.

The lower court does not question the jurisdiction of the District Court to entertain the cause of action for money damages either under the Constitution, cf. *Bell* v. *Hood*, 327 US 678; *Wheeldin* v. *Wheeler*, 373 US 647; *Bock* v. *Perkins*, 139 US 628, or under Title 42 USC 1983 and 1985; *Monroe* v. *Pape*, 365 US 171; *Lee* v. *Hodges*, 321 F. 2d 480 (CA4, 1963); *Nesmith* v. *Alford*, 318 F. 2d 110 (LA 5, 1963); *Hughes* v. *Johnson*, 305 F. 2d 67 (CA9, 1962); *Cohen* v. *Norris*, 300 F. 2d 24 (CA9, 1962); *Basista* v. *Weir*, 340 F. 2d 74 (CA3, 1965); *Beauregard* v. *Wingard*, 230 F. Supp. 167 (D.C.S.D. Cal. 1964); *Bargainer* v. *Michal*, 233 F. Supp. 270 (D.C.N.D. Ohio, 1964). Nor does the lower court voice any hesitation as to whether the complaint adequately states a cause of action for money damages under the Civil Rights Act, cf. *Monroe* v. *Pape; Nesmith* v. *Alford; Lee* v. *Hodges; Hughes* v. *Johnson; Cohen* v. *Norris; Basista* v. *Weir; Beauregard* v. *Wingard; Bargainer* v. *Michal*, all *supra*. Cf. *Dombrowski* v. *Pfister*, *supra*, at p. 490.[12] Neither does the lower court seriously entertain any doubts as to the presence in the record of material disputed issues of fact as to respondents' participation in a knowing concert of action with the state officials requiring resolution by means of a trial. See opinion below, Appendix A.

Nevertheless, despite clear federal jurisdiction, an adequately pleaded cause of action, and genuine issues of fact in the record as to respondents' participation in a conspiracy under color of Louisiana state law to deprive petition-

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[12] It is significant in this respect that this Court specifically held in the first *Dombrowski* opinion that the allegations of that complaint "state a claim under the Civil Rights Act, 42 USC 1983" citing *Beauregard* v. *Wingard*, and *Bargainer* v. *Michal*, *supra*. The allegations of the present complaint for money damages under 1983 are, of course, identical in substance to the *Dombrowski* v. *Pfister* complaint, arising out of the same factual situation. See Statement of Facts, *supra*.

ers of federally protected rights, the lower court casts a mantle of total immunity over these respondents from any actions for damages under the Civil Rights Act. This stretches the immunity doctrine to unrecognizable contours and transforms a concept historically fashioned as a shield to protect the freedom of speech of legislators from the oppressive tyranny of an overbearing executive, cf. *United States* v. *Johnson*, #25, October Term, 1965, US , 86 S. Ct. 749 (1966), into a privileged sanctuary for men in high places to participate in and carry through activities in flagrant violation of the Constitution they are sworn to uphold. Such a distortion of the legislative immunity doctrine finds no support in the decisions of this Court from *Marbury* v. *Madison to United States* v. *Johnson* in the present Term.

2. The lower court reads the decisions of this Court as requiring the imposing of the shield of legislative immunity wherever a defendant utilizes his position as a legislator to further his violation of law. Thus the lower court brushes aside the allegations and evidence tending to show that the respondents had participated in a conspiracy with state officials to utilize state law to contrive false arrests and to engineer illegal raids by arguing that "this . . . ignores that the conduct of which appellants complain could not have been undertaken had appellees had no official legislative positions and responsibilities" Appendix A. But, this is the heart of the problem. A doctrine which immunizes the illegal acts of a legislator merely because the legislator uses his official position to accomplish the violation of law would sanction a governmental tyranny wholly destructive of the liberties of citizens. No greater danger to a free society exists than the concept that men in high places are immune to the prohibitions of the law merely because they hold these high positions. A policeman who beats a citizen or who seizes his property without a warrant is not immune from legal recourse by the citizen because the policeman wears his uniform and carries his

badge while he beats his victim or seizes his possessions. Cf. *Monroe* v. *Pape, supra.* Similarly a legislator who takes part in a conspiracy to carry out an illegal search and seizure in violation of the Fourth Amendment is not immune from a legal response merely because he takes advantage of his official position to further the illegal conspiracy. Cf. *United States* v. *Johnson, supra.*

This Court has carefully emphasized that the test of the appropriateness of legislative immunity is not the official status of the legislator but the nature of the acts he is called to account for. The lower court reads this Court's decision in *Tenney* v. *Brandhove,* 341 US 367 (1951), as a sanction for the broad cloak of immunity it cast over respondents' charged illegal activities. But *Tenney* rejected the limitless concept of legislative immunity the lower court invokes. Mr. Justice Frankfurter carefully pointed out that the doctrine is properly called into play only where "it appears that the defendants were acting in the sphere of legitimate legislative activity." *Tenney* v. *Brandhove,* at p. 376. Any legislative immunity, Justice Frankfurter insisted in *Tenney,* extends only to conduct within "the sphere of legitimate legislative activity." And Justice Frankfurter further reiterated that "this Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove,* at p. 377. In applying this definition of legislative immunity to the facts before the Court in Tenney, Justice Frankfurter carefully confined the holding of the majority:

> "We conclude only that here the individual defendants and the Legislative Committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct." [*Tenney* v. *Brandhove,* at p. 379]

The concurring opinion of Mr. Justice Black, sharpened the definition of legislative immunity presented in the *Ten-*

ney majority opinion. Mr. Justice Black emphasized the outer boundaries of the doctrine:

> "The Court holds that the Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The Court's opinion also points out that Kilbourn v. Thompson, 103 US 168, 28 L. Ed. 377, held legislative immunity to have some limits. And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act. I substantially agree with the Court's reasoning and its conclusion."

The action of the lower court in immunizing the illegal conduct of respondents Eastland and Sourwine is in complete conflict with the principles delineated in both the *Tenney* majority and concurring opinions. The acts charged in the complaint, the conspiracy to utilize unconstitutional state laws to arrest petitioners without cause, to raid their offices and homes and seize their property in violation of the Fourth Amendment, all for the purpose of intimidating and deterring them and other citizens from exercising fundamental rights in order to achieve racial equality is hardly "legitimate legislative activity" on the part of legislators or their employees. Cf. *Tenney* at p. 376. Nor is a conspiracy to violate the federal rights of citizens "a field where legislators traditionally have power to act." Cf. *Tenney* at p. 379.

As Mr. Justice Black warned in his concurring opinion, the *Tenney* decision "indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in

a suit brought under the Civil Rights Act." This petition presents such a point. It is difficult to imagine any conduct which could more exceed "the bounds of legislative power." If *Tenney* could be read to immunize such conduct then the reservations of Mr. Justice Douglas in the dissenting opinion as to the majority formulations ought to be reconsidered and the entire doctrine reevaluated.

3. Only this Term this Court has warned against a distortion of the legislative immunity doctrine which would blur the distinction between legislative activity legitimately protected by the Speech or Debate Clause and unlawful conduct for which a legislator remains accountable in law. In *United States* v. *Johnson, supra,* the Court in reversing the conviction of a Congressman for violation of the conflict of interest statute and conspiracy to defraud the United States carefully pointed out that while reliance upon a speech made by the defendant on the floor of the House in the trial of the conspiracy count violated Article I, Section 6,[13] only the speech was immunized and not the charged unlawful conduct. Thus, Mr. Justice Harlan warned for the Court:

> "No argument is made, nor do we think that it could be successfully contended, the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 86 S. Ct. at 751.[14]

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[13] "For any Speech or Debate in either House, they shall not be questioned in any other place."

[14] It is revealing in this respect that the Court in *Johnson* did not dismiss the indictments against the Congressman but remanded for new trials on both the conspiracy and substantive counts purged of reliance upon the speech delivered on the floor of the House. The Chief Justice and Justices Douglas and Brennan would have affirmed the substantive counts for violation of the conflict of interest statute without remanding these counts for a new trial.

The teaching of *United States* v. *Johnson* is directly applicable here. The Speech or Debate Clause does not reach conduct such as was involved in the conspiracy to utilize the overbroad anti-subversive laws of Louisiana to obtain the illegal arrest of the petitioner and provide a pretext for raids and seizures violative of the Fourth Amendment. This is conduct no less heinous than an "attempt to influence the Department of Justice" and no less prohibited by applicable federal statutes.[15] And as in *Johnson* it is conduct "that is in no wise related to the due functioning of the legislative process." 86 S. Ct. at p. 751. The decision of the lower court is in sharp conflict with this Court's recent decision in Johnson and ought to be reviewed and reversed.

4. In *Johnson* the Court had the occasion to probe the historical roots of the Speech or Debate Clause. As Mr. Justice Harlan carefully points out:

> "There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause." 86 S. Ct. at 755-6.

The matrix out of which the American legislative privilege was fashioned was the determination to protect the absolute freedom of speech of representatives of the people from "intimidation by the executive and accountability before a possibly hostile judiciary." 86 S. Ct. at 755. Thus in *Kilbourn* v. *Thompson*, 103 US 168, the first discussion in this Court of the dimensions of the legislative privilege, the Court, mindful of this purpose, read the Clause broadly to include not only "words spoken in debate," but any-

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[15] Cf. 18 USC 241, 242. See *United States* v. *Price*, US , 86 S. Ct. 1152; *United States* v. *Guest*, US , 86 S. Ct. 1170 (1966).

thing "generally done in a session of the House by one of its members in relation to the business before it," 103 US at p. 204. But it would be ironic indeed if a privilege of immunity designed to protect the free speech of legislators were to be turned into an instrument for the destruction of the free speech of citizens. Yet this will be the inevitable result unless a tendency of inferior federal courts reflected in the decision below to read the opinions of this Court as sanctioning a limitless immunity is not checked.

The underlying constitutional concern with "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments," *United States* v. *Johnson, supra,* footnote 12, has at least as important a place in the constitutional spectrum as the insistence upon the "independence and integrity of the legislature." *United States* v. *Johnson, supra.* Indeed the Court in *Johnson* recognizes that these two objectives are deeply interrelated. See Footnote 12. This case presents to the Court the necessity for accommodating one fundamental constitutional value—"the central importance . . . of uninhibited political expression [by] the general populace" with another fundamental constitutional value—"the independence and integrity of the legislature." This adjustment of separate but interrelated values can be accomplished through a repudiation of the formless and automatic immunity concept applied by the lower court and an insistence that the limitations upon the doctrine, implicit in *Kilbourn* and made explicit in *Tenney,* will be rigorously enforced, particularly where the illegal activities of the legislator trenches upon the rights of citizens to "uninhibited political expression." *United States* v. *Johnson, supra.*

When Mr. Justice Miller first discussed the Speech or Debate Clause in this Court in *Kilbourn* he found it important to state the limitations upon the privilege being then

enunciated which the Court might one day have to face. Thus in sustaining the privilege as to a resolution offered on the floor of the House he pointedly stated: "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." Again in *Tenney*, in joining the majority, Mr. Justice Black warned of a point at which a legislator's conduct "so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act."

When a legislator conspires with officials of a state to utilize state laws to harass citizens with false arrests and illegal raids and seizures in order to frighten and deter these citizens from exercising the rights of speech, press and assembly in their efforts to implement the constitutional promise of racial equality, the moment Mr. Justice Miller warned of in *Kilbourn* has come. This is conduct "of an extraordinary character for which the members who take part in the act may be held legally responsible." A proper deference to the paramount constitutional objective of "uninhibited political expression as guaranteed to the general populace," *United States* v. *Johnson*, *supra*, requires that the limitations to the legislative immunity doctrine reiterated by the Court from *Kilbourn* to *Johnson* be rigorously enforced particularly where, as here, in violation of federal law, the acts of the legislator in question interfere with and deter that "uninhibited political expression" "of certain importance to our political system." *United States* v. *Johnson*, (opinion of Mr. Justice Harlan).

5. The opinion of the lower court is in sharp conflict with the recent decision of this Court in *Wheeldin* v. *Wheeler*, 373 US 656 (1963). *Wheeldin* involved an action for damages for injuries caused to the petitioner by the service of a subpoena upon him by the respondent, an investigator for the House Committee on Un-American Activ-

ities. The complaint alleged that the subpoena was signed in blank by the Chairman of the Committee and was unauthorized by the full Committee. The Court of Appeals for the Ninth Circuit invoked the immunity doctrine and dismissed the damage cause of action, 302 F. 2d 36, relying upon this Court's decision in *Barr* v. *Matteo*, 360 US 564.

In this Court both the majority opinion of Mr. Justice Douglas, 373 US 647, and the dissenting opinion of Mr. Justice Brennan, joined in by the Chief Justice, and Mr. Justice Black, 373 US at p. 653, reject any reliance upon an immunity concept in respect to the *Wheeldin* cause of action for damages.

Mr. Justice Douglas, for the majority, disposes of the immunity claim summarily by recording the fact that before the Court "the Solicitor-General has conceded, under the allegations respondent Wheeler was not acting sufficiently within the scope of his authority to bring the doctrine into play." 373 US at p. 647.

And the dissenting Justices likewise brush aside the blanket invocation of immunity with this analysis of the lower court's opinion:

> "It sustained the District Court's dismissal on the sole ground that the allegedly unlawful acts had been committed by respondent in the line of his duty as a federal officer, and that therefore he was immune from suit by reason of the principles announced in *Barr* v. *Matteo*, 360 U. S. 564. In this Court, the Solicitor General of the United States, appearing as counsel for the respondent, candidly admits that the Court of Appeals misapplied *Barr* v. *Matteo*. In that case we upheld the governmental-officer immunity in respect of 'action . . . taken . . . within the outer perimeter of petitioner's line of duty.' 360 U.S., at 575. It has never been suggested that the immunity reaches beyond that perimeter, so as to shield a federal officer acting wholly on his own. A federal officer remains liable for acts committed 'manifestly or palpably beyond his authority.' *Spalding* v. *Vilas*, 161 U.S. 483, 498; see *Colpoys* v. *Gates*, 73 App. D.C. 193, 118 F. 2d 16;

Kozlowski v. *Ferrara*, 117 F. Supp. 650; Note, Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 835 (1957). Liberally construed, see *Virgin Islands Corp.* v. *W. A. Taylor & Co.*, 202 F. 2d 61; 2 Moore, Federal Practice (2d ed. 1948), ¶12.08, at 2245, petitioner Dawson's complaint alleges no less."

The concession of the Solicitor General in *Wheeldin* that the respondent there was not "acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play" applies with particular force to the present petition. Here, as in *Wheeldin*, the only conceivable colorable authority for respondents' participation in the illegal acts charged was the utilization on October 4th and 5th, 1963, of subpoenas purportedly issued on the authority of a Congressional Committee. See Statement of Facts, *supra*. But here, exactly as in *Wheeldin*, the subpoenas were signed in blank by the Chairman; compare 373 US at p. 648 with Statement of Facts, *supra*, at p. 8, and were filled out by the subordinate official; compare 373 US at p. 648 with Statement of Facts, *supra*, at p. 8, and were issued without the authorization or knowledge of the Congressional Committee involved;[16] compare 373

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[16] While the respondents sought to "cure" the obvious lack of authorization for the subpoenas by a subsequent resolution on November 14, 1963 "receiving" the seized material and providing for its photostating and inclusion in the "permanent records" of the Subcommittee, see opinion below, Appendix A, at p. 3a, considerable additional serious doubt was cast upon the existence of any Subcommittee authorization for the actions of the respondents by a letter from Senator Kenneth B. Keating, a member of the Subcommittee, to respondent Eastland. The letter read as follows:

January 30, 1964

Honorable James O. Eastland
Chairman
Senate Judiciary Committee
Washington 23, D. C.

Dear Mr. Chairman:

I understand that the records of the Southern Conference Educational Fund, Inc., were subpoenaed October 5 at your direction.

US at p. 648, with Statement of Facts, *supra*, at p. 8. If respondent Wheeler was not "acting sufficiently within the

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I understand further that they were transferred to Mississippi October 27, two days after a request by officials of the SCEF in the Louisiana Criminal District Court for a permanent injunction to bar removal of these records from the area.

I further understand that on November 14 some members of the Internal Security Subcommittee approved a resolution to incorporate portions of this material by reference into the hearing record and to photostat it in full before returning it. That resolution was not brought to my attention until my staff specifically inquired January 27.

I would therefore like to take this occasion to express my deep concern over the action taken. First, I question what federal legislative purpose is served by the subpoenaing of material already under review by a committee of a state legislature. Secondly, I am very much opposed to the subpoena of any records that are material to pending litigation in a state court. This strikes me as a startling violation of states' as well as individual rights.

Thirdly, I am disturbed that, although a member of the subcommittee which has, in effect, ratified this action, I was not informed of this action or given any opportunity to express my dissent.

Regardless of the nature of the group involved in this case, I believe the action taken by the subcommittee is most unfortunate and I strongly urge that no further actions be undertaken by the committee along these or similar lines without full discussion by the entire subcommittee.

Very sincerely yours,

KENNETH B. KEATING

(Exhibit A to affidavit of counsel in opposition to motion for summary judgment) (32a, 33a).

On the basis of this letter petitioners moved pursuant to Rule 56, subdivision (f) of the Federal Rules of Civil Procedure for "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had." This motion was denied by the District Court.

scope of his authority to bring the doctrine into play" neither were the respondents here.[17]

But *Wheeldin* applies with even greater force to this cause of action for damages under the Civil Rights Act. The majority opinion, after disposing of the immunity question, and asserting the existence of federal jurisdiction, 373 US at p. 649, found that the "facts alleged do not establish a violation of the Fourth Amendment", 373 US at p. 650. Absent other considerations not here germane [18] it is perfectly clear that had the complaint adequately alleged a Fourth Amendment violation the majority of the Court would have sustained the complaint.[19]

This petition, unlike the complaint in *Wheeldin* brings before the Court a classic Fourth Amendment cause of action. And here, it is not necessary to rest upon the

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[17] It is significant in this connection that the Court of Appeals for the District of Columbia in *Shelton* v. *United States*, 327 F. 2d 601 (1963) has only recently held that subpoenas of the same Subcommittee here involved, the Internal Security Subcommittee, are illegal, void and unauthorized when they are issued by one member of the Committee, even if he is Chairman, without the prior authorization and approval of the Subcommittee. Respondent Sourwine testified on deposition in this case as follows:

"Q. Did the Committee or Subcommittee authorize the submission of the subpoenas? A. No."

[18] The majority opinion also holds that the Civil Rights Acts were not applicable in *Wheeldin* since under 42 USC 1983, the respondent there was not acting under color of state law, and no conspiracy was charged invoking 42 USC 1985. Neither of these questions is relevant here since this complaint both charges a conspiracy under 1985 and also charges respondents with acting together with state officials under color of the laws of the state of Louisiana. A cause of action under 1983 and 1985 is clearly stated. See *Monroe* v. *Pape*, *Nesmith* v. *Alford*, *Lee* v. *Hodges*, all *supra*. Cf. *United States* v. *Price*, *supra*.

[19] The dissenting judges, Mr. Justice Brennan, the Chief Justice, and Mr. Justice Black, would have sustained a cause of action in tort even without the Fourth Amendment allegations.

allegations of the complaint alone. The state courts of Louisiana have already held that the arrests were illegal and that the raids and seizures violated the Constitution. See Statement of Facts, *supra*. The material seized was ordered suppressed as evidence by the state courts and this Court itself ordered the immediate return of all papers and documents seized. *Dombrowski* v. *Pfister*, 380 US at p. 498.

The only remaining question under *Wheeldin* would be whether the complaint and record adequately showed respondents' relation to the Fourth Amendment violations sufficient to require a trial of the action. And as to this, the lower court has already held that absent considerations of immunity it would "have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial". Appendix A *infra*. The conclusion is inescapable that under both the majority and dissenting opinions in *Wheeldin* the decision of the lower court ought to be reversed and the respondents should be required to stand trial on the serious charges set forth in the complaint.

6. This petition brings to the Court a clear conflict between the Circuits which ought to be resolved. The conflict presented which urgently requires the intervention of this Court reflects not only fundamental differences in the interpretation of the doctrine of legislative immunity but wholly contradictory results in the application of the doctrine to the same factual record. Upon precisely the same complaint and essentially the same record [20] the Fifth Circuit and the District of Columbia Circuit have come to diametrically opposite conclusions. While the District of Columbia Circuit has apparently concluded that a broad mantle of legislative

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[20] The record in the first action, brought in the Eastern District of Louisiana, contained in addition depositions taken of Chairman Pfister. Petitioners here sought permission to introduce this deposition in the Washington action but the District Court denied a motion under Rule 56(f) for time to file the deposition (31a to 35a).

immunity protects respondents Eastland and Sourwine from the normal processes of law, the Fifth Circuit has concluded that Chairman Pfister of the Louisiana Joint Legislative Committee must stand trial together with the other Louisiana state officers charged to be conspirators and participants in the violation of petitioners' constitutional rights. See Statement of Facts, *supra*.

In a series of opinions, (Appendices D and E), District Judge Ainsworth considered the precise questions raised by these respondents in the District of Columbia, and concluded that since "there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity" a motion for summary judgment or dismissal must be denied and the defendant must be required to stand trial. Out of a concern for "judicial economy" Judge Ainsworth certified the question for an interlocutory appeal. The Court of Appeals for the Fifth Circuit thereafter dismissed the appeal sustaining the conclusion of the District Court that the Louisiana legislators involved in the charged conspiracy to violate petitioners' constitutional rights must stand trial in a Louisiana Federal Court. *Pfister* v. *Burbank*, Misc. #168, Court of Appeals, Fifth Circuit, 1965.

This presents a sharp and irreconcilable conflict between the Circuits which will result not only in a total disparity of judicial relief in the present case but in continued conflict and confusion in the application of the doctrine of legislative immunity in an area of growing national concern in the enforcement of the Civil Rights Acts. This apparent conflict between the Circuits ought to be resolved by this Court.

7. Regardless of the disposition of the legislative immunity question as to respondent Eastland, the extension of the doctrine by the lower court to immunize the actions of respondent Sourwine was unjustifiable and in clear conflict with controlling decisions of this Court.

Respondent Sourwine is the counsel for the Internal Security Subcommittee. He is not a member of Congress. The constitutional protection of the Speech or Debate Clause does not extend to him. The precise question was settled by this Court in *Kilbourn* v. *Thompson, supra.* In *Kilbourn,* the action was for damages for false imprisonment. The defendants were several members of the House of Representatives and one John A. Thompson, Sergeant-at-Arms of the House. In upholding the immunity cast by the Speech or Debate Clause over the members of the House, the Court specifically and clearly refused to extend the immunity to the Sergeant-at-Arms, and directed that the judgment of dismissal must be reversed as to him and the case remanded for further proceedings. Thus the Court concludes in Kilbourn:

> "... we think the plea set up by those of the defendants who were members of the House is a good defense, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed. As to Thompson, the judgment will be reversed and the case remanded for further proceedings."

103 US at p. 205.[21] The lower court's extension of the legislative immunity doctrine to immunize the wrongful acts of respondent Sourwine was in complete conflict with the direct holding of this Court in *Kilbourn* and should be reviewed and reversed.[22]

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[21] The plaintiff later recovered a money judgment for $20,000 against Thompson, the Sergeant-at-Arms. See Goldfarb, *The Contempt Power,* (Col. Univ. Press 1963) p. 34.

[22] The vitality of the *Kilbourn* insistence that the legislative immunity doctrine applies only to members of a legislature is evidenced in the Court's reaffirmation of this limitation in *Tenney* v. *Brandhove, supra.* Mr. Justice Frankfurter wrote for the majority: "It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In *Kilbourn* v. *Thompson, supra,* this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House."

The lower court appears to concede that under *Kilbourn* no immunity extends to respondent Sourwine, but suggests that the *Kilbourn* holding has in some way been modified by this Court's decision in *Barr* v. *Matteo*, 360 US 564. This, however, was precisely the position urged in *Wheeldin* and repudiated by the Court. Mr. Justice Douglas' comments in the majority opinion are that "there is much discussion in the briefs of *Barr* v. *Matteo*, 360 US 564", and then points out "But that was a libel action brought against a federal official in the District of Columbia", 373 US at 650. *Barr*, as Justice Douglas indicates, reflects a judicially developed law of privilege relating to officers of the Executive Branch of government, while questions of legislative privilege are constitutional in nature deriving their authority from Article I, Section 6. See *Barr* v. *Matteo*, opinion of Mr. Justice Harlan at p. 569.

The considerations which led the majority of the Court in *Barr* v. *Matteo* to extend the executive privilege to the Acting Director of the Office of Rent Stabilization are not applicable in the area of legislative activity. The policy considerations underlying the decision of the sharply divided Court in *Barr* v. *Matteo* to so extend the executive immunity reflected a concern with "the effective functioning of government" in a period of "complexities and magnitude of governmental activity". 360 US at p. 564. The policy considerations underlying the Speech or Debate Clause are very different. They reflect, as the Court discusses in *United States* v. *Johnson, supra*, the necessity for protecting the free speech and independence of legislators. These principles are not primarily involved when employees of a legislature such as the Sergeant-at-Arms of the House, as in *Kilbourn*, or the counsel to a Senate Committee, as here, are held accountable at law for otherwise wrongful acts.

Moreover, even if *Barr* v. *Matteo* were extended to cover legislative employees, and further extension of its doctrine would raise serious policy questions, see the dissenting

opinions of the Chief Justice and Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Stewart, 360 US at pps. 579, 586 and 592, it could not be read so as to impose any immunity upon the charged acts of respondent Sourwine. Sourwine is charged with participation in a conspiracy under color of Louisiana laws to contrive false arrests and to carry through illegal raids and seizures for the purpose of interfering with the protected rights of citizens. His claim to colorable authority resulting in immunity lies in his use of subpoenas signed in blank by respondent Eastland, unauthorized by the Committee itself. See Statement of Facts, *supra,* and point 5 *supra,* Reasons for Granting the Writ. As in *Wheeldin* v. *Wheeler,* the doctrines of *Barr* v. *Matteo* have no applicability here. Sourwine, as Wheeler, "was not acting sufficiently within the scope of his authority to bring the doctrine into play". *Wheeldin* v. *Wheeler,* opinion of Mr. Justice Douglas, 373 US at p. 647.

The concurring opinion of Mr. Justice Black in *Barr* v. *Matteo,* without which there would not have been a Court, is most instructive in this respect. Mr. Justice Black joined the Court on the assumption that the activity of the government official complained of was "neither unauthorized nor plainly beyond the scope of Mr. Barr's official business but instead related more or less to general matters committed by law to his control and supervision." 360 US at pps. 577 and 578.

The activity of respondent Sourwine was "unauthorized" by the Committee. See point 5 *supra;* cf. *Shelton* v. *United States, supra.* And it is certainly clear that participating in the planning of illegal arrests, raids, and seizures in violation of the Constitution was "plainly beyond the scope" of Mr. Sourwine's "official business".[28]

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[28] It must be stressed here that the lower court has found that as to the question of whether respondents Sourwine and Eastland "were parties to a knowing concert of action with the state officials" it "would have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial." Appendix A, *infra.*

Under the definitions of the concurring opinion in *Barr*, no immunity attaches to the charged activities of respondent Sourwine.

8. If, on the other hand, *Barr* v. *Matteo* could be read as sanctioning the immunizing of respondent Sourwine's conduct in this case, that decision ought to be reconsidered. In his dissenting opinion in *Barr*, joined in by Mr. Justice Douglas, the Chief Justice pointed out that the extension of an absolute privilege of immunity to the government official there involved "can only have the added effect of deterring the desirable public discussion of all aspects of our Government and the conduct of its officials". 360 US at p. 585. The effect of such an extension of the immunity doctrine, the Chief Justice concluded, would be to "sanctify the powerful and silence debate". 360 US at p. 585. The Chief Justice's warning is even more relevant in the circumstances of the present case. Extension of a doctrine of immunity to employees of congressional committees investigating political opinions and associations of citizens would be to encourage lawless and arbitrary action in a field in which considerable concern has already been expressed as to the impact of legislative investigative activity upon the sensitive area of First Amendment liberties. See *Watkins* v. *United States*, 354 US 178; *DiGregory* v. *New Hampshire*, — US —, 86 S. Ct. 1148, #396 this Term; Cf. *Gojack* v. *United States*, cert. granted, 382 US 937, #594 this Term. As in *Barr*, "this is a much more serious danger than the possibility that a government official might occasionally be called upon to defend his actions and to respond in damages". *Barr* v. *Matteo*, 360 US at 585. Furthermore, the caution raised by Mr. Justice Brennan in his dissenting opinion in *Barr* is most appropriate here. The Justice warned that "the courts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of the public business". 360 US at pps. 588

and 589. Requiring the respondent to stand trial on the charges of conspiring to contrive false arrests and illegal raids and seizures no more places an "undue burden on the conduct of the public business" than does requiring the defendant in *United States* v. *Johnson* to stand trial for charges of conspiring to defraud the United States. As the dissenting Justices in *Barr* conclude, the public interest is far greater served by permitting citizens recourse to legal remedies for wrongs committed upon them by government officials than by immunizing the wrongful conduct out of a perhaps unfounded concern that litigation may impede the proper functioning of government. See Mr. Justice Brennan's opinion in *Barr* v. *Matteo,* 360 US at p. 589.

9. The district court dismissed the cause of action for equitable relief, without a hearing on the allegations, treating the action as a request for injunctive relief against a Committee of the Senate. Invoking the principle of "separation of powers" the district court stated that "this Court may not enjoin a Congressional Committee from pursuing its activities", Appendix B, *supra,* and dismissed the complaint for want of jurisdiction.

The Court of Appeals properly disregarded this contention pointing out that the complaint did not seek to enjoin the Senate Committee in any respect, but that the relief sought was directed solely against the individual respondents. As the Court of Appeals conceded the complaint did not seek injunctive relief against the functioning of a Congressional Committee. The gravamen of the cause of action, insofar as it affected respondents Eastland and Sourwine, was the charge that these individuals, together with other individuals, participated in a plan of conspiracy to utilize the laws of the State of Louisiana to deprive the appellants of rights, privileges and immunities secured to them by federal law. *Cf. Monroe* v. *Pape, supra,* see Title 42 U.S.C. 1983, 1985.

The complaint further charged that these individuals "without warranty or authority of law" pursuant to the conspiracy "secretly and surreptitiously" were in possession of certain books, records and other documents which had been seized in the illegal raids of October 4th conducted under color of laws of the State of Louisiana (see Complaint, paragraph 22 (7a)).

The complaint went on to charge that "in order to evade the jurisdiction" of the United States District Court for the Eastern District of Louisiana, the respondents transferred certain of these documents and records to the District of Columbia and that these "are presently in the possession of defendants Eastland and Sourwine in the District of Columbia". Other documents and records belonging to petitioners were "also secretly and surreptitiously transferred to a State Court House in the State of Mississippi and are presently in the possession of defendant Eastland" (Complaint, Paragraph 22 (7a)).

The complaint nowhere charged that the illegally seized records or documents were in the custody or possession of the Senate Committee. It charged solely that they were illegally and without "warrant of law" in the possession of the individual respondents, Sourwine and Eastland, who had obtained them pursuant to a conspiracy to utilize Louisiana state laws to violate appellants' federally protected rights.

This complaint clearly states a cause of action for equitable relief under the Civil Rights Act. *Hague* v. *CIO*, 307 U.S. 496; *Bush* v. *New Orleans Parish School Board*, 188 F. Supp. 916, aff'd 365 U.S. 569; *Jordan* v. *Hucheson*, 323 F. 2d 597 (C.A. 4, 1963), and cases cited *supra*. The conspiracy charged is one to utilize state laws to interfere with federally protected rights. The doctrine of separation of powers has no relevance here. The complaint charges that respondents, together with legislative and executive officials of the state, conspired to use state law to conduct

the illegal raids. The fact that they are "legislative" officers, has no impact upon the power of a federal court to grant equitable relief.

As far as the complaint was concerned, and that was all that was properly before Judge Holtzoff on the motion to dismiss, *Clark, Attorney General* v. *Vebersee Firanz Korporation,* 332 US 480, injunctive relief was sought to restrain these respondents who had participated in a conspiracy under color of state law, from using or disposing of the fruits of the illegal searches and seizures. There was no allegation whatsoever that the illegally seized material was in the possession of the Senate Committee, nor was any injunctive relief sought against the Committee. As a matter of fact, the complaint alleged that a good portion of the illegally seized material was then sitting in the private possession of respondent Eastland in a state courthouse in the State of Mississippi (7a).[24]

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[24] Paragraph 22 of the Complaint states:

"22. In further pursuance of this conspiracy defendants Burbank, Willie and Pfister, at the request of defendants Eastland and Sourwine secretly and surreptitiously, without warrant or authority of law, transferred a portion of said books, records, documents and other articles belonging to the plaintiffs out of the jurisdiction of the United States District Court for the Eastern District of Louisiana. Plaintiffs had instituted in that Court a proceeding under appropriate federal statutes to obtain the return of said documents and articles, and to receive appropriate redress under the law for the illegal acts of the defendant conspirators. In order to evade the jurisdiction of that Court, the defendants caused to be transferred a portion of the said documents, records and other articles to the District of Columbia. Upon information and belief said documents, articles and records are presently in the possession of defendants Eastland and Sourwine in the District of Columbia. Other documents and records, all belonging to the plaintiffs, illegally and in violation of the Constitution of the United States seized from them, were also secretly and surreptitiously transferred to a State Court House in the State of Mississippi, and are presently in the possession of defendant Eastland."

The Court of Appeals does not rest its affirmance upon the jurisdictional grounds invoked by the District Court. Instead it bases its sanction of the dismissal of the equitable cause of action purely upon its conclusion that the equitable relief sought against the individual respondents would not be effective since other "members of the Subcommittee would still have unfettered use of the documents". Appendix A, *infra*. [25] This portion of the opinion of the lower court is based upon an assumption that although the complaint probably adequately states a cause of action for equitable relief against the individual respondents,[26] it should be dismissed because the relief sought, although otherwise valid, may have been frustrated by subsequent actions of the respondents in turning the seized documents over to the Senate Committee. That this assumption was wholly unwarranted is apparent in light of the record before the district court at the time of dismissal. The fact that the seized materials, first removed at midnight on the evening before a federal court hearing, out of the

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[25] The lower court relied upon this Court's statement in *Virginia Ry. v. System Federation No. 40*, 300 US 515, 550 (1937), that "A court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of no benefit to the plaintiff." What the lower court did not mention was that in *Virginia Ry.*, this Court *upheld* the granting of equity relief pointing out that "whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion" 300 US at p. 551. It is perfectly clear that under *Virginia Ry.* this "exercise of discretion" can be engaged in only after a hearing on the facts of "the special circumstances of each case" 300 US at p. 551.

[26] It would be difficult indeed to hold that the complaint did not state a cause of action for equitable relief against the individual respondents in view of this Court's holding in *Dombrowski* that the allegations there stated a cause of action under Title 42 USC 1983. 380 US at p. 490.

reach of the jurisdiction of the federal court, see Statement of Facts, *supra,* then deposited in the sanctuary of a Mississippi chancery clerk's office safe from the process of the Eastern District of Louisiana, see Statement of Facts, *supra,* were now in the Washington offices of the Internal Security Subcommittee of the Senate, was hardly a reason to assume that an injunction permanently restraining the individual respondents from using the fruits of the illegal raids and seizures would be "of no benefit to the plaintiffs". Cf. opinion of lower court, Appendix A, *infra.*

At a minimum, petitioners were entitled to a hearing on their complaint at which time the respondents' defense of futility to the plea for equitable relief could have been tested. See *Virginia Ry.* v. *System Federation, supra.* Among the many issues petitioners were entitled to litigate would have been the highly pertinent question as to whether the individual respondents retained copies of the seized documents, particularly the membership lists illegally taken, and whether they had given these copies to other individuals throughout the country. At this moment petitioners can only speculate as to where these copies, admittedly made by respondents, are now located.[27]

To sanction the dismissal of the equity provisions of the complaint on the ground that the actions of the respondents had in effect frustrated any possibility of legal

[27] This Court is well aware of the use sought to be made of membership lists of civil rights organizations in certain areas of the Southern states. Cf. *NAACP* v. *Alabama; NAACP* v. *Flowers; Louisiana* v. *NAACP,* all *supra.* Since the decision of the Court in *NAACP* v. *Alabama* it has become increasingly clear that enforced production of membership lists of civil rights organizations active in the Southern states itself violates the Constitution. The Complaint charges that a central purpose of the conspiracy was to utilize the Louisiana laws as a pretext for the staging of raids during which the membership lists could be seized—lists not otherwise obtainable to the Southern authorities through lawful legislative process, state or national.

relief, would be to lend judicial approval to the extraordinary course of events set off by the October raids. The Louisiana state court could not order the return of the seized materials when it quashed the original arrest warrants because it was told by the state participants in the conspiracy that the seized materials were technically not in their hands but under the control of the respondents. The Louisiana federal court to which the petitioners then turned for relief could not order the materials returned because they were spirited out of its jurisdiction by these respondents the night before the hearing on a temporary restraining order, into the sanctuary of a Mississippi Chancery Clerk's office, safely across the Louisiana border. And when federal process finally caught up with the respondents in the District of Columbia in the form of this action, petitioners were faced with the final frustration of any legal recourse—the conclusion of the lower court that petitioners were too late since respondents had safely deposited the illegally obtained material in hands supposedly beyond the reach of the law.[28]

The peremptory dismissal of the equitable cause of action not merely legitimates a course of conduct designed to frustrate any effort to invoke the processes of law, state and federal, to protect these petitioners from the harmful effect of raids and seizures both the Louisiana Courts and this Court have condemned as unlawful. It frustrates the mandate and decree of this Court. In *Dombrowski,* the Court ordered the District Court to frame a decree providing for the immediate return of all papers and documents seized. The reinstatement of the equitable cause of action in this case would permit the enforcement of the decree of this Court in respect to these individual respondents since, by their own admissions, copies of all

[28] The entire story of this unsuccessful legal pursuit of the illegally seized materials is set forth in the Statement of Facts and the record of the case.

seized materials have been retained. (Affidavit of respondent Sourwine (46, 47a).

10. This petition has brought before the Court a series of questions which touch the fundamentals of a free society. In essence they raise the issue as to whether any man by virtue of his power, his status, or his authority, is wholly above the law.

In this case a United States Senator, together with his assistant, is charged with participating in a conspiracy together with officials of the State of Louisiana to use laws of the state to procure the false arrest of citizens, to arrange for illegal raids and seizure of their property, for the purpose of intimidating and frightening them and other citizens from exercising the rights of speech, press and assembly to bring about the elimination of racial segregation and discrimination. The laws of the United States provide for remedies against such conduct. The Civil Rights Acts were designed for this very purpose. This Court must now decide whether the remedies the Congress has provided will be denied to these petitioners because the participants in the conspiracy to bring about results this Court has already condemned in *Dombrowski* v. *Pfister* include men whose status places them above the law. In *Marbury* v. *Madison* this Court said, in the first days of the Republic, that "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right".

In reviewing the opinions below and reversing the judgments, this Court would be reaffirming these words.

CONCLUSION

The petition for the writ of certiorari should be granted, and the judgments below reversed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,435

No. 18,544

JAMES A. DOMBROWSKI, *et al.*,

Appellants,

v.

COLONEL THOMAS D. BURBANK, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PER CURIAM: The appellants in this case are a Louisiana civil rights organization and its executive director. Their complaint in the District Court sought injunctive relief and damages under 42 U. S. C. §§ 1983 and 1985. The first of these appeals, No. 18,435, is from an order dismissing the claim for injunctive relief. The second, No. 18,544, is from the grant of appellees'[1] motion for summary judgment on the claim for damages.

The complaint alleged in substance that various Louisiana officials, in league with appellees, illegally

[1] Although the complaint named a number of defendants, most of these appear to be residents of Louisiana upon whom service of process was not effected. Appellees are the only two defendants who were served; and they are, respectively, the Chairman and the Chief Counsel of the United States Senate Internal Security Subcommittee.

searched the offices of appellants and seized documents and records.[2] These papers, while in the possession of the Louisiana officials, were subjected to a subpoena issued in the name of the United States Senate Internal Security Subcommittee. Compliance with this subpoena resulted in the transfer of the seized papers to the custody of the Senate Subcommittee which, in plenary session, made provision for their handling by the resolution set forth in the margin.[3] Appellants, asserting that the subpoena was

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[2] A detailed description of this action is contained in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). The Supreme Court in that case, decided while the instant appeals were under submission, invalidated the Louisiana statute under which the Louisiana officials purported to act, and directed that the relief to be afforded by the District Court in Louisiana should include "ordering immediate return of all papers and documents seized."

[3] The full entry in the Subcommittee's minutes is as follows:

November 14, 1963

Upon the conclusions of the testimony of the second of two witnesses heard in executive session, the Subcommittee considered and discussed the handling of material subpoenaed from the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

Present: Senators Eastland, Dodd, Hruska, Dirksen, and Scott.

After discussion, and on motion of Senator Dirksen, it was ORDERED that the Chairman be authorized to appoint a Task Force consisting of Senators Eastland, Johnson, Dodd, Hruska and Scott to evaluate the subpoenaed material progressively with respect to its value to the Subcommittee's investigation and to make determination from time to time respecting particular papers, documents, or other material to be inserted verbatim in the record of the Subcommittee; that all of the material not clearly irrelevant to the Subcommittee's investigation of Communist activity generally, of Communist front activity, of Communist infiltration of organizations and groups, and/or the source of funds for Communist, or Communist front activities be ordered into the Committee's hearing record by reference subject to the later determination of the Task Force respecting particular items which should be entered into the record verbatim; and that all of the original records obtained under the subpoena be photostated for the permanent records of the Subcommittee and, when so photostated, be returned promptly to the posses-

deficient in authority from the Subcommittee, seek damages, as well as an injunction requiring appellees to return their records and to refrain from using them.

No. 18,435

Appellants' complaint alleged that the seized materials were in the possession of appellees. However, the affidavits submitted in opposition to appellants' motion for a preliminary injunction revealed that the Senate Subcommittee had incorporated the documents in its hearing record and made express provision for their examination and disposition by the collective act of the Subcommittee. See note 3 *supra*.

Since the seized materials must thus be regarded as in the possession of the Senate Subcommittee,[4] a judicial command addressed solely to appellees—one member of the Subcommittee and one of its staff—cannot be assured of effect. The test, set forth by the Supreme Court in

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sion of the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

James O. Eastland, Chairman

I consent and agree to the foregoing procedure.

John F. McClellan
Olin D. Johnston
Roman L. Hruska

[4] Appellants contend that the trial court, in dismissing the prayer for injunctive relief, should have limited its consideration to the allegations of the complaint. Reliance is placed upon *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485 (1900), for the proposition that all of the allegations of the complaint must be regarded as true on a motion to dismiss a bill in equity on its face. But even in *Mast, Foos & Co.*, the Court regarded consideration of affidavits as appropriate. 177 U. S. at 495. See also Rule 12, FED. R. CIV. P.; MOORE, FEDERAL PRACTICE ¶ 12.09 (2d ed. 1964). What the Court disapproved was dismissal when a question of fact was involved. On this record, in light of the affidavit setting out the Subcommittee resolution, the dismissal does not involve the resolution of any question of fact which may fairly be regarded as disputed.

Williams v. *Fanning*, 332 U. S. 490, 494 (1947), of the indispensability of a superior to a suit for injunctive relief against a subordinate is whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Cf. Hynes* v. *Grimes Packing Co.*, 337 U. S. 86 (1949). Of course, there is only partly present in this case a relationship between a superior and a subordinate official as there was in *Williams*; nevertheless, the problem of requiring a subordinate official to undertake acts capable of accomplishment only by his superior, which seems central to the purpose of the *Williams* test, also characterizes the difficulties implicit in requiring either of the appellees to return documents held by the full Senate Subcommittee.[5]

The dismissal of appellants' request for injunctive relief to prevent appellees from using the seized records also flows from the undisputed fact that the materials are in the custody of the Subcommittee. Since the documents are now held by the Subcommittee, they are accessible to the appellees only by virtue of their official positions with that body. We cannot prohibit, nor are we asked to prohibit, appellees' use of the documents in the course of their official business for the Subcommittee; and neither do appellants seek any restraint upon the Subcommittee itself. See *Hearst* v. *Black*, 66 U. S. App. D. C. 313, 87 F. 2d 68 (1936), where this court refused to enjoin a congressional committee from using information it had obtained by illegal means. There, considerations resting upon a proper allocation of powers and responsibilities among the coordinate branches of the federal system impelled

[5] See also *Blackmar* v. *Guerre*, 342 U. S. 512 (1952). That was a suit for reinstatement by a discharged government employee. Because the Civil Service Commissioners were not parties to the suit, and the only defendant before the court could not grant the requested relief without their approval, the Court held that dismissal of the suit was proper.

this court not to exercise its equity powers.[6] In any event, however, the relief requested here is directed solely at appellees. Disclosure of the documents in the course of the Subcommittee's official action would not be prevented by the decree prayed for against appellees; and all other members of the Subcommittee would still have unfettered use of the documents. "A court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of no benefit to the plaintiff." *Virginia Ry.* v. *System Federation No. 40,* 300 U. S. 515, 550 (1937).

No. 18,544

Appellees contend that the grant of their motion for summary judgment was proper because (1) appellants failed to put forward a serious claim that appellees were parties to a knowing concert of action with the state officials, and (2) in any event, the doctrine of legislative immunity insulates appellees from suit. Were only the former involved, we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial. But we need not pursue that inquiry since we think the record before the District Court contained unchallenged facts of a nature and scope sufficient to give appellees an immunity against answerability in damages for actions taken in the course of their legislative activities.[7]

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[6] See also *Jordan* v. *Hutcheson,* 23 F. 2d 597 (4th Cir. 1963); *Pauling* v. *Eastland,* 109 U. S. App. D. C. 342, 288 F. 2d 126, *cert. denied,* 364 U. S. 900 (1960); *Mins* v. *McCarthy,* 93 U. S. App. D. C. 220, 209 F. 2d 307 (1953). See generally *Developments in the Law-Remedies Against the United States and Its Officials,* 70 HARV. L. REV. 827 (1957).

[7] It is settled by *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), that such immunity provides a defense to actions brought for damages under the Civil Rights Act. See also Comment, 40 NOTRE DAME LAW. 70 (1965); Note, 68 HARV. L. REV. 1229 (1955). For general discussions of the Civil Rights Act, see Comment, 49 CALIF. L. REV. 145 (1961), Note, 66 HARV. L. REV. 1285; Comment, 74 YALE L. J. 1462 (1965).

The issue, in the large, is whether the actions taken with respect to appellants' records were within the scope of appellees' duties for the Senate Subcommittee. Citing our decision in *Shelton* v. *United States*, 177 U. S. App. D. C. 155, 327 F. 2d 601 (1963), appellants argue that the subpoenas were invalid because they were issued and executed without the prior authorization of the Subcommittee, as distinct from its Chairman. *Shelton*, however, held only that a person compelled to testify before a Senate Subcommittee by an invalid subpoena could not be convicted of contempt for failing to respond to the Subcommittee's questions. No necessity existed there for considering the dangers of inhibiting the legislative process by the threat of personal liability to those engaged in it. These are at the core of the public policies reflected in the immunity doctrine.[8]

The Internal Security Subcommittee is required by Senate Resolution to investigate "the extent, nature and effect of subversive activities in the United States. . . ." S. Res. 62, 88th Cong. There is no question that the Senate may legitimately conduct such investigations. As has been said, "The power of Congress to conduct investigations is inherent in the legislative process. That power is broad." *Watkins* v. *United States*, 354 U. S. 178, 187 (1957); see also *Tenney* v. *Brandhove*, 341 U. S. 367, 377-78 (1951). Appellants' own affidavits establish that, for more than a decade, the Subcommittee has evinced an active interest in appellants. As the Subcommittee's Chairman and Chief Counsel, respectively, appellees have immediate responsibilities in the Subcommittee's operations. It is true that the records held by the Louisiana Committee were subpoenaed without prior authorization from the Subcommittee, although the Chairman expressly approved in advance the action pro-

[8] That different considerations are involved when the personal liability of the legislators is involved is illustrated by the facts in *Yellin* v. *United States*, 374 U. S. 109 (1963), which was relied upon in *Shelton*.

posed to be taken. But this action was shortly brought by appellants to the attention of the Subcommittee as a whole, which discussed the matter of the subpoenaed papers. After such consideration the Subcommittee, by formal resolution, incorporated the papers in its hearing record, and provided for their ultimate disposition.

Whether this apparently approving action by the full Subcommittee would serve as a *nunc pro tunc* ratification and consequent validation of the subpoena for all purposes, we need not decide. We do regard it as serving to keep appellees' acts in pursuing the Subcommittee's long-standing interest in appellants within the mainstream of legislative effort to a degree adequate to protect against liability in damages for issuing and executing the subpoena. Appellees acted in an area in which the Subcommittee was competent to function. Had appellees received Subcommittee authorization before issuing the subpoena, the official nature of their actions would be evident. Acting first and receiving authorization later does not, under the facts of this case, put their actions beyond the pale of official legislative activity, at least for purposes of the immunity doctrine.[9]

Nor does *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963), compel a different result. The plaintiff there sought damages from an investigator for the House Un-American

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[9] What appellants essentially contend is that appellees, by acting without prior authorization, acted with a malicious purpose, *i.e.*, to further a conspiracy to deprive appellants of their civil rights. *Tenney* v. *Brandhove*, however, precludes inquiry into appellees' motives to determine the legitimacy of their conduct:

> The claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if they [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck*, . . . that it was not consonant with our scheme of government to inquire into the motives of legislators, has remained unquestioned. 341 U. S. at 377.

Appendix A

Activities Committee for the allegedly malicious act of serving a subpoena which had been approved by no one, either before or after its issuance. In the Supreme Court the Solicitor General conceded that the complaint on its face showed the defendant to be acting wholly outside the scope of his official duties; and this concession prompted the Court, in the course of otherwise holding that no federal cause of action was made out by the complaint, to note that the immunity doctrine had no relevance. Here, unlike *Wheeldin*, the record before us shows without dispute not only that the subpoena was expressly authorized in the first instance by the Chairman of the legislative committee, but also that the full committee ratified the action taken when the matter was promptly brought to its attention. Even if it be assumed that there remained a legal hiatus in the title of the subpoenaing authority, immunity from suit is not thereby destroyed. As was said by the dissenting judge in *Wheeldin:* "The question of authority is, of course, distinct from that of immunity from civil suit. Even an unauthorized act may be within the scope of the immunity, so long as it is within the 'outer perimeter' of the officer's 'line of duty.'" [10] 373 U. S. at 656 n. 4. This is, of course, "a matter of defense," but summary judgment may rest upon such a defense where, as here, its existence is established by facts which are undisputed.

Finally, appellants contend that because they charge appellees to have conspired with various officials under the color of *state* law, appellees can claim no immunity because

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[10] Judge Learned Hand once put the point in these terms:

"[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to satisfy a jury of his good faith. . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try

of their positions with the Senate Subcommittee. It is argued that appellees' positions with that body must be regarded as incidental and irrelevant to the present suit; and that appellees are to be viewed as in the position of any other citizen. This, however, ignores that the conduct of which appellants complain (appellees' activities pursuant to the subpoena) could not have been undertaken had appellees had no official legislative positions and responsibilities.[11]

The judgments of the District Court are

Affirmed.

Washington, *Senior Circuit Judge*, did not participate in this decision.

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to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U. S. 949 (1950).

See also *Barr* v. *Matteo*, 360 U. S. 564 (1959); *Cooper* v. *O'Connor*, 69 U. S. App. D. C. 100, 99 F. 2d 135, *cert. denied*, 305 U. S. 642 (1938); *Brownfield* v. *Landon*, 113 U. S. App. D. C. 248, 307 F. 2d 389, *cert. denied*, 371 U. S. 924 (1962); *Bershad* v. *Wood*, 290 F. 2d 714 (9th Cir. 1961).

[11] Although it has been suggested that the protection of the legislative immunity doctrine does not extend to appellee Sourwine, cf. *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880), what was said in *Barr* v. *Matteo* about the immunity of executive officials seems persuasive here. "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions . . ." 360 U. S. at 572-73. See also, *Cooper* v. *O'Connor*, *supra*; *Bershad* v. *Wood*, *supra*.

APPENDIX B

The Court: This is an action against Senator Eastland, the Chairman of the Senate Judiciary Committee, J. G. Sourwine, the counsel of one of the subcommittees of that Committee, and numerous other defendants. Only Senator Eastland and Mr. Sourwine have been served with process. The other defendants have not been served and have not appeared and consequently they are not before the Court.

The action has two aspects insofar as the two defendants who have appeared are concerned. First, it seeks an injunction against the reproduction and use of certain documents that have come into the possession of the Senate Judiciary Committee. Second, it seeks money damages. Although in form only one count is set forth, actually there are two claims for relief or two causes of action, which for the sake of clarity should be set forth as two separate counts.

The plaintiff has moved for a preliminary injunction against the two defendants who have appeared and now seeks to withdraw that motion, stating, however, that it desires to renew it if it can secure additional evidence which it proposed to do, in part at least, by taking the deposition of one of the defendants.

Counsel for the two defendants contend that the cause of action for an injunction does not set forth a valid claim for relief and that under no set of circumstances that could be proven thereunder could the plaintiff prevail and counsel for the two defendants accordingly ask the Court to dismiss that cause of action as to them at this time.

This procedure has been approved by the Supreme Court in Mast Foos & Company v. Stover Manufacturing Company, 177 U. S. 485, 495.

This case involves the basic principle of constitutional law of separation of power. Sometimes we tend, amidst dealing with numerous details, to forget the basic principles

of law and it is useful occasionally to refresh ourselves at the fountain of the basic principles.

It is elementary that our Federal Government is divided into three coordinate branches. No one of the three may interfere with the activities of either of the other two except in the limited matters as provided by other provisions of the Constitution. Consequently, this Court may not enjoin a Congressional committee from pursuing its activities.

If any authority is needed to support this elementary principle the Court may refer to Hearst v. Black, 66 App. D. C. 313, in which in an opinion written by Judge Groner the Court of Appeals for this jurisdiction held that a Senate committee could not be enjoined from making use of certain telegrams which had come into its possession and which it was claimed by the plaintiff had been seized illegally.

In Methodist Federation For Social Action v. Eastland, 141 F. Supp. 729, a Three-Judge Court in this District, in an opinion written by Circuit Judge Edgerton, held that the courts could not enjoin a subcommittee of the Senate Committee on the Judiciary from printing and circulating a pamphlet. In this case Judge Edgarton made this significant statement:

> "We have no more authority to prevent Congress or a committee or public officer acting at the express direction of Congress from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem. The Constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament or an American

court to restrain Congress from publishing any statement. This history therefore tends to confirm our view."

In the light of this discussion the Court will dismiss as to defendants Senator Eastland and Mr. Sourwine the alleged claim for an injunction.

You may submit an order accordingly.

APPENDIX C

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

SECTION B

No. 183 459

Vio. R. S. 14:360

STATE OF LOUISIANA

against

JAMES A. DOMBROWSKI

JUDGMENT

On January 29, 1964 the Orleans Parish Grand Jury found a True Bill against the defendant, charging said defendant with violating Revised Statute 14:360. On March 5, 1964 the defendant, through his counsel of record,

filed a Motion for Prayer for Oyer and a Motion to Suppress the evidence. Hearing was had on the Motion to Suppress on March 23, 1964 and at the conclusion of the presentation of evidence and brief argument by both the State and the Defense, the matter was continued as an open matter for purposes of filing briefs. Briefs were received by the Court from both the State and Defense at which time the matter was taken under advisement. At the same time, the time of the presentation of the briefs, counsel for defendant filed a Plea of Res Judicata and, accordingly this, too, was taken under advisement. On May 28, 1964 the State, through the Assistant District Attorney, filed its Answer to the Plea of Res Judicata and other memoranda in support of their positions. The matter was then set for further argument on June 9, 1964.

As to the Plea of Res Judicata counsel for defense cites to the Court that this matter Case No. 181 975 of Section E of the Criminal District Court for the Parish of Orleans involving the same defendant, and the same Search Warrants here involved, found that the State witnesses "obviously have not justified the arrest . . ." and ". . . since there has not been a prima facie case made against these three defendants and, therefore discharges them without date." (Transcript of the record.)

Counsel for defendant points out that since they found the [sic] Arrest Warrants of the defendant was found to be illegal then, necessarily, the Search Warrants, issued concurrently with the Arrest Warrants, and upon the same application, are also illegal and Pleads Res Judicata, citing to the Court the recent decision of the Supreme Court of Louisiana in the case of State v. Latil, 92 So. 2, 63; and quoting other decisions. The State, in its argument, admits the hearing in Section E of this Court, admits the determination as regards the validity of the arrest warrant,

but denies that there was a determination of the identical, factual and legal issues were involved.

This Court must accept the argument of the defendant and reject that of the State.

On the question of the suppression of the evidence, both the defense and the State have presented this Court with lengthy arguments and briefs. Needless to say, the historic Mapp v. Ohio (367 U. S. 643, 81 S. Ct. 1686, 1961) was cited to the Court by the defendant, along with many, many other citations. Further, in the matter of Marcus et al. v. The Search Warrant of Property, etc., 367 U. S. 717 the Court found that the authorities in seizing more property than that which was specifically declared in the warrant acted illegally. This is particularly what took place in this matter presently before this Court; even to the extent that the State has offered to return to the defendant all of the material which they do not consider contraband.

The Court feels that *at least* in view of the two cases cited supra, not to mention other grounds, that the State exceeded its authority in carrying out this search and seizure, and accordingly,

It is ORDERED, ADJUDGED and DECREED that the Motion to Suppress and the Plea of Res Adjudicata herein filed be and the same are hereby Maintained.

JUDGMENT READ, RENDERED and SIGNED IN OPEN COURT THIS 12th day of JUNE 1964.

/s/ George P. Platt
GEORGE P. PLATT,
Judge, Section B.

Clerk's Office, June 15, 1964.
A TRUE COPY.

GEO. SMITH, *Deputy Clerk,*
Criminal District Court,
Parish of Orleans.

APPENDIX D

Minute Entry
April 20, 1964
AINSWORTH, J.

No. 13967
CIVIL ACTION
DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. The court, having heard the argument of counsel and having considered the briefs, affidavits and deposition in support thereof, is now ready to rule.

IT IS ORDERED that motion of defendant, James H. Pfister, to dismiss be, and the same is hereby, DENIED.

REASONS

Mover, a member of the Louisiana Legislature is entitled to absolute immunity under the doctrine of *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), if the affidavits and deposition submitted by the parties indicate that he was acting at the time "in the sphere of legitimate legislative activity." Here there is a sharp dispute as to the

facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates when he is alleged to have committed tortious acts against plaintiff. As was said in *Tenney*, supra, "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation." The United States Supreme Court decision was therefore predicated upon the state of facts which it found in the *Tenney* case. Since there is a genuine issue as to material facts, summary judgment is not permissible under Rule 56 of the Federal Rules of Civil Procedure. See National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F. 2d 647. A full trial on the merits is necessary to determine the respective rights of the parties. We express no opinion now as to the facts, beyond stating that they are vigorously disputed between the involved parties.

APPENDIX E

Minute Entry
March 18, 1965
AINSWORTH, J.

No. 13967

CIVIL ACTION

DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor and, alternatively, for an order as authorized by 28 U. S. C. § 1292(b).

The Court, having heard the argument of counsel and having considered the affidavits, deposition and briefs in support thereof and opposed thereto, is now ready to rule.

IT IS ORDERED that the motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor be, and the same are hereby, DENIED.

IT IS FURTHER ORDERED that the alternative motion for an order as authorized by 28 U. S. C. § 1292(b) be, and the same is hereby, GRANTED.

Appendix E

REASONS

By our minute entry dated April 20, 1964, we denied the motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. This motion is a renewal thereof and is denied for substantially the same reasons as are contained in our former ruling. There is no disagreement between the Court and mover as to the law of the case. It is found in *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), where the Court held that a member of a State legislature was entitled to immunity from suit for damages, under the particular facts there submitted. The Supreme Court in *Tenney* said:

> "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation."

As we said in our prior decision, *Tenney* was decided by the Court upon the state of facts which it found, that is, that the complained of acts of the legislator were deemed to be fairly within the province of the Committee's inquiry and, therefore, immune to suit for damages. Here that question is disputed in the most vigorous manner by opposing affidavits submitted by the plaintiff and the deposition of defendant Pfister. In *Norton* v. *McShane*, 5 Cir., 1964, 332 F. 2d 855, the Court granted immunity to certain federal officials growing out of the Ole Miss confrontation because the affidavits submitted by respondents were uncontroverted. That is not true here. Not only are they controverted, but the credibility of the statements of defendant Pfister is also contested by plaintiff. As was said in plain-

tiff's memorandum in opposition to the present motions, "This overlooks the significant fact that whereas the affidavits of third party defendants are not controverted, the affidavit of defendant Pfister concerning his lack of participation in the tortious acts complained of *is very much controverted* by his own public statements on the date of the raid, October 4, 1963, to public, press, radio and T.V." Then plaintiff refers to his own affidavit filed herein in March, 1964, in which he attached a transcript of an interview of Mr. Pfister over New Orleans Station WDSU-TV and in which plaintiff alleges that Mr. Pfister made the following statement:

> "Today's operation has been done jointly by the Louisiana State Police and the New Orleans Police Department at our request. This has been a combined operation of substantial complexity and we are very much in debt to these fine police agencies for their splendid work and their splendid cooperation. We particularly commend them for the very efficient and professional manner in which they have handled the mechanics of their raid and the delicate problems arising therefrom. Today's raids have been on the offices and homes of certain key figures and key officers and members of the Southern Conference Educational Fund who have been actively, and probably under Louisiana statutes, illegally, operating a Communist front organization here in the City of New Orleans. The evidence seized in the raids may be subpoenaed by our committee. The federal authorities have taken no official action against this Communist front group despite two separate Congressional committee hearings on its activities. It appears that there is a definite need for legislative action on the state level to cope with such organizations. The Southern Conference Edu-

cational Fund has been operating openly in New Orleans for many years to the intense disgust of most decent citizens who know what the organization really is. Under the guise and the sham of the racial issue, many good and well meaning people have been duped into supporting this Communist-led group. It appears that a substantial amount of material has been obtained. It will take some time for it to be carefully evaluated. The committee plans to hold open hearings on this subject matter in the future. Our committee counsel, Jack N. Rogers, and our committee staff director, Col. Frederick C. Alexander, Jr., both of Baton Rouge, deserve much credit for the extensive investigation and the very intensive planning which necessarily preceded this operation. All of the members of our committee have unanimously concurred in the operation which took place today."

In plaintiff's memorandum of March 1, 1965, he said:

> "In addition, a deposition of Judge Thomas Brahney, recently dismissed by Pfister as a third party defendant, likewise *tends to cast some doubt* on Mr. Pfister's allegation that he knew nothing of the raid prior to the occurrence."

It is clear that plaintiff is attacking the credibility of Mr. Pfister. Whether he has a right to do so can only be determined after a trial of this material issue which is so strongly contested between these two parties. We are unable to do so on the motions before us because a trial court should not on a motion for summary judgment attempt to determine questions of credibility. *Girard* v. *Gill,* 4 Cir., 1958, 261 F. 2d 695; *Blenke Brothers Co.* v. *Ford Motor Company,* D. C., N. D. Ind., 1963, 217 F. Supp. 459; *Holdeen* v. *United States,* D. C., S. D. N. Y., 1960, 186

F. Supp. 76; *Buren* v. *Schein*, D. C., E D. N. Y., 1963, 32 F. R. D. 218; and summary judgment is usually not possible in a conspiracy case such as is alleged here. *Deterjet Corp.* v. *United Aircraft Corp.*, D. C., D. Del., 1962, 211 F. Supp. 348. A summary judgment should only be given when it is quite clear what the truth is, *Koepfle* v. *Garavaglia*, 6 Cir., 1952, 200 F. 2d 191, and should never be entered except where the defendant is entitled to its allowance *beyond all doubt*. *Mitchell* v. *Pilgrim Holiness Church Corp.*, 7 Cir., 1954, 210 F. 2d 879. In passing upon such a motion it is no part of the Court's function to decide issues of fact but solely to determine whether there are issues of fact to be tried. *Hoffman* v. *Babbitt Bros. Trading Co.*, 9 Cir., 1953, 203 F. 2d 636. The standard in passing on a motion for summary judgment is *strict* and it should be granted only when it is *perfectly clear* that no issue of fact is involved. *Clarke* v. *Montgomery Ward & Company*, 4 Cir., 1962, 298 F. 2d 346. It is an *extreme remedy* and should be granted only when the facts are quite clear and any doubt must be resolved against movant. *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, D. C., S. D. Cal., 1961, 192 F. Supp. 882. Where there is the *slightest* doubt as to the facts, the motion should be denied. *Dale Hilton, Inc.* v. *Triangle Publications, Inc.*, D. C., S. D. N. Y., 1961, 27 F. R. D. 468. In order for the Court to issue a summary judgment there must be no disputed questions of fact or conflicting inferences to be drawn from undisputed facts which, if settled against the moving party, would allow the plaintiff to recover. *Sheets* v. *Burman*, 5 Cir., 1963, 322 F. 2d 277.

We emphasize that what we say here and what was said in our April 20, 1964 minute entry evidences no opinion by the Court as to the facts involved. The facts are material, however, and though the determination as set forth in *Tenney* is narrow because the issue is whether the com-

plained of acts of defendant Pfister may fairly be deemed within the province of the Legislative Committee's inquiry and it must be obvious that there was a usurpation of functions, the present state of the record leaves us no alternative but to deny the motion for summary judgment.

The alternative motion for an order under 28 U.S.C. § 1292(b) is more complicated. Respondent argues that he has an *absolute* immunity under the *Tenney* rule from a suit for damages for acts done in his capacity as a State legislator because he contends that his deposition and the affidavits show that the complained of acts should "fairly be deemed within the province" of the Legislative Committee's inquiry, of which he was Chairman; and as was said in *McShane,* he was acting within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. We do not read *Tenney* as granting an absolute immunity from all acts of a State legislator. It is our belief that the law of the *Tenney* case requires an examination of the facts to see if the legislator's acts may "fairly be deemed within the province" of legislative activity. Respondent reads *McShane* also as granting immunity because respondent contends that the deposition and affidavits conclusively show that his acts as a State legislator were within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. There is involved, therefore, a controlling question of law as to whether there is an absolute legislative immunity under the circumstances here. The difficulty is that the circumstances are disputed and we do not think it possible to resolve them without a trial on the merits. However, the record indicates that respondent Pfister will appeal from our recent dismissal of his third-party complaint against his co-legislator members of the Legislative Committee. We signed a final judgment in that matter pursuant to Rule 54(b), and the judgment is appealable. In the interest of judicial economy we have granted an order for an interlocutory appeal here in order

that the question of law contended for by respondent Pfister may be determined. However, by doing so we do not in any way change our belief that summary judgment is not possible under the circumstances of the record here. A consideration of the appeal from our judgment dismissing Pfister's third-party complaint against his co-legislators will necessarily involve the same issue of law as was raised on the present motions. Thus the granting of an immediate appeal from our present order may materially advance the ultimate termination of the litigation.